IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 26TH SEPTEMBER 2007 / 4TH ASWINA 1929

CRL.A.No. 77 of 2002(C)

CC.2/2000 of SPECIAL JUDGE (SPE/CBI) I, ERNAKULAM

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APPELLANT: ACCUSED NO.1

K.RADHAKRISHNAN, TECHNICAL ASSISTANT,
QUALITY ASSURANCE ESTABLISHMENT (NAVAL),NAVAL BASE
COCHIN.

BY ADVS. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENTS: COMPLAINANT & STATE

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1. THE INSPECTOR OF POLICE, (SPE/CBI),
COCHIN REPRESENTED BY THE STANDING COUNSEL, HIGH
COURT OF KERALA, ERNAKULAM.

2. STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,ERNAKULAM.

BY ADV. SRI.S.SREEKUMAR, SC FOR CBI -R1
PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED -R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26/09/2007, ALONG WITH CRA NO. 80 OF 2002 THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL. M.P. NO.534 OF 2002 IN CRL. APPEAL NO.77 OF 2002.

DISMISSED

26.9.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NOS. 77 & 80 OF 2002

Dated this the 26th day of September, 2007

JUDGMENT

Accused Nos.1 and 2 in C.C.No.2 of 2000 on the file of the Special Judge (SPE/CBI)-I, Ernakulam are the appellants herein. Crl. Appeal No.77 of 2002 is filed by the first accused and Crl. Appeal No.80 of 2002 is filed by the second accused in the Calendar Case. Both the appellants faced trial for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act") read with Section 120B I.P.C.

2. The prosecution case against the accused - appellants is as follows: PW.1 and his brother PW.11 were conducting the business of manufacture and supply of tarpaulin to various institutions. While so, M/s. International Tarpaulin Company owned by PW.1 received an order from Naval Base, Cochin on 6.9.1999 for the supply of tarpaulin worth Rs. 1,00,000/- which was to be sent to Khargil urgently and on the basis of the said order, the company started work on the very same day. The

procedure for supplying tarpaulin is that when the tarpaulin is ready, it should be inspected and certified by the Quality Inspector of Quality Assurance Establishment (Q.A.E.) of Naval Base . The appellants were the Quality Inspectors who were entrusted with the work of inspecting the tarpaulin. On 8.9.1999, at about 10.45 a.m., after completing the work worth Rs.70,000/-, PW.1 went to the Q.A.E. office at Naval Base to bring the Quality Inspector to his company for inspecting the tarpaulin and he was told that the appellants - accused were entrusted with the said work. On approaching the first accused, PW.1 was asked to get a taxi to go to the place of inspection. Thereupon PW.1 hired a taxi from M/s. Sunitha Taxis near Cochin Shipyard, both the accused and another person got into the car and on the way to the company, the third person who got into the car alighted at the South Railway Station. Further, at the request of the first accused , they had meals at Hotel Al Jas at Kundanoor and then proceeded to the company. During inspection, the first accused informed PW.1 that the balance supply will be inspected and the quality certificate will be given only on condition that 5% of the value which would come to Rs.5000/- was given to them. The second accused nodded in agreement and the the first accused demanded Rs.2500/- to be paid on that day itself. Thereafter, both the accused and PW.1 went to the office of PW.1 and in the presence of PW.8, the Manager of the company, the first accused again

demanded Rs.5000/-. As PW.1 did not pay the amount demanded, both the accused left the office of PW.1 and as per the direction of the first accused, both the accused were taken to their place of residence and PW.1 gave Rs.500/- to the first accused towards hire charges of the taxi. Thereafter, the first accused contacted PW.1 over the telephone and told him that he will be coming for inspection either on the 15th or 16th of September, 1999 and also asked PW.1 to come to the Q.A.E. office on 15.9.1999. When PW.1 went to the Q.A.E. office at about 10.45 or 11 a.m. as directed, the first accused asked PW.1 whether he had brought the amount demanded and when PW.1 gave him the letter which was to be given to Q.A.E. office, the first accused wrote another letter and asked PW.1 to bring it to the office and give it to the second accused after getting it typed. The second accused received the letter and asked PW.1 to come to the office on 16.9.1999. On that day when PW.1 informed the first accused that he had not brought the amount, the first accused asked PW.1 to get a taxi to go to the company for inspection and after inspection, the first accused complained about the stitching of the tarpaulin and after having a conversation with the second accused, he again demanded the money and left the place saying that the certificate will be given only on 17.9.1999. Before the first accused left the company, PW.1 told him about his financial difficulties whereupon the first accused reduced the amount to

Rs.2000/-. On 17.9.1999 when PW.1 went to the Q.A.E. office, the first accused gave him the inspection report and asked him to come to the Hotel Palace at Pallimukku between 5.15 and 5.30 p.m. with Rs.2000/-.

3. As PW.1 was not willing to give bribe, he went to the office of C.B.I. and gave Ext.P1 complaint to PW.6, the then Deputy Superintendent of Police, C.B.I., Cochin on the basis of which PW.10, the Inspector of Police, C.B.I., Cochin registered a complaint against the accused and made arrangements for laying a trap. Further, on the instruction of PW.10, PW.1 handed over Rs.2000/- to PW.10 in the presence of PWs.2 and 6 and CW.3 and after demonstrating phenolphthalein test on a ten rupee currency note and explaining the significance of the test, MO.6 series of currency notes produced by PW.1 were smeared with phenolphthalein powder and after noting down the number and denomination of the currency notes, the marked currency notes were handed over to PW.1 as per Ext.P2 entrustment mahazar with an instruction to give the same to the first accused on demand and to give a signal as soon as the first accused accepts the amount. The officers, the trap witness and PW.1 then proceeded to Palace Hotel and at about 5.25 p.m., the first accused came to the hotel and PW.1 and the first accused occupied a table on the ground floor. The trap party occupied adjacent

tables. The first accused then received the tainted currency notes from PW.1 and placed the money inside his brief case whereupon PW.10 came over to the table occupied by PW.1 and the first accused and recovered the currency notes from the brief case of the first accused. Thereafter phenolphthalein test was conducted which gave positive result. After conducting further investigation, charge was filed against both the accused.

4. To prove the case against the appellants - accused, the prosecution examined PWs.1 to 13 and produced Exts.P1 to P35 as well as MOs.1 to 7. On the side of the defence, DWs.1 and 2 were examined and Exts.D1 to D4 were produced. On closing the prosecution evidence, both the accused were questioned under Section 313 Cr.P.C. Both the accused denied the charges levelled against them. The first accused, however, stated that the amount which he received from PW.1 was the money which PW.1 had borrowed from him on an earlier occasion. Accepting the evidence adduced by the prosecution, the trial court found the first accused (appellant in Crl. Appeal No.77 of 2002) guilty under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act read with Section 120B I.P.C., convicted him thereunder and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.50,000/- and in

default of payment of fine, to undergo rigorous imprisonment for a further period of six months for the offence under Section 13(1)(d) read with Section 13(2) of the P.C. Act. He was further sentenced to undergo rigorous imprisonment for three years for the offence under Section 7 of the P.C. Act and also rigorous imprisonment for two years for the offence under Section 120B I.P.C. The substantive sentences were ordered to run concurrently. The trial court found the second accused (appellant in Crl. Appeal No.80 of 2002) guilty under Section 120B I.P.C., convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.25,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of three months. The above conviction and sentences are challenged in these appeals.

5. This Court heard the learned counsel appearing for the appellants as well as Sri. S. Sreekumar, learned Standing Counsel for the C.B.I.

6. Learned counsel appearing for the appellant in Crl. Appeal No.77 of 2002 has raised the following contentions in challenging the judgment of the trial court: (i) the trial court committed serious error in believing PWs.1 and 2 to find that the appellant demanded any amount from PW.1 as

bribe, as alleged by the prosecution as the evidence of PWs.1 and 2 is not corroborated by any other evidence, (ii) the trial court ought to have considered the case set up by the appellant that the amount he received from PW.1 was the amount which PW.1 had borrowed from him on an earlier occasion, (iii) PW.2, the trap witness had not given any evidence regarding the demand made by the appellant at the time of receiving the marked currency notes from PW.1 as he had stated before the court that he had not heard the conversation that took place between the appellant - first accused and PW.1, (iv) even if the evidence of PW.1 is accepted, mere recovery of the marked currency notes by itself will not prove the offence either under Section 7 or Section 13(1)(d) read with Section 13(2) of the P.C. Act and (v) the finding of the trial court that the appellant committed offence punishable under Section 120B I.P.C. is not on the basis of any legally acceptable evidence as the prosecution had not adduced any evidence to prove conspiracy between the first and second accused.

7. Learned counsel appearing for the appellant in Crl. Appeal No.80 of 2002 submits that the prosecution had not succeeded in proving that the appellant and the first accused entered into a conspiracy for the commission of the alleged offences. Counsel further submits that in order to establish an offence under Section 120B I.P.C., the prosecution should

prove that there was prior meeting of the minds of the accused. According to the learned counsel, the evidence adduced by the prosecution does not show any such circumstance to draw the conclusion that the appellant - second accused conspired with the first accused at any time. Counsel also submits that the evidence of PW.1 also does not show the involvement of the appellant in the commission of the offences.

8. It is seen that in Ext.P1 complaint given by PW.1 before PW.6, he had stated that he had taken both the appellants to the company on 8.9.1999 and 16.9.1999 to inspect the tarpaulin and that the first accused (appellant in Crl. Appeal No.77 of 2002) had demanded an amount of Rs.5000/- as illegal gratification for issuing the quality certificate. He had also stated in Ext.P1 that on 12.9.1999, the first accused reminded him of the amount and that on 16.9.1999 after inspecting the tarpaulin at the company, the first accused again repeated the request and that finally PW.2 agreed to give Rs.2000/-. It is further stated by PW.1 in Ext.P1 that the first accused asked him to come to the Q.A.E. office on 17.9.1999 for the certificate and later to meet him at Palace Hotel for payment of Rs.2000/-. The evidence given by PW.1 before the trial court is similar to the statements given by him in Ext.P1. Hence, the contention of the learned counsel that there is no evidence to show that the first accused demanded

any amount from PW.1 is not correct. It is proved beyond reasonable doubt that the first accused had demanded Rs.5000/- from PW.1 and finally agreed to accept Rs.2000/-. The evidence of PW.1 and the recovery evidence of PWs.6 and 10 would clearly show that the first accused had demanded bribe from PW.1. The numbers and other particulars of the currency notes produced by PW.1 were also noted and the same currency notes were recovered by PW.10 from the brief case of the first accused. In the above circumstances, it is not necessary to have any other evidence to prove that the first accused - appellant in Crl. Appeal No.77 of 2002 demanded bribe from PW.1 for the official act of issuing the quality certificate of tarpaulin to be supplied to the Naval Base, Cochin. Apart from the above, it can be seen from the evidence of PW.8, though he was declared hostile to the prosecution, that on 16.9.1999 when the appellants came to the company , there was a talk between the first accused and PW.1 regarding payment of bribe. In the above circumstances, this Court is of the view that the prosecution has succeeded in proving that the first accused - appellant in Crl. Appeal No.77 of 2002 had demanded bribe from PW.1.

9. With regard to the case set up by the first accused when he was questioned under Section 313 Cr.P.C., it is seen that Ext.D3 promissory

note alleged to have been given by PW.1 to the first accused is not proved by the defence. Further, considering the evidence of DW.2 who was already examined as PW.10, it is not possible to hold that the case set up by the first accused is correct. Hence, the second ground urged by the learned counsel for the appellant in Crl. Appeal No.77 of 2002 is also not sustainable. Considering the entire evidence, this Court is of the view that the prosecution succeeded in proving that the first accused - appellant in Crl. Appeal No.77 of 2002 committed offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act.

10. The next question to be considered is whether the prosecution has succeeded in proving the offence under Section 120B I.P.C. against both the accused. It is clear from the evidence of PW.1 that he got an order from the Naval Base, Cochin for supply of tarpaulin worth Rs.1,00,000/- and as per the proceedings, the goods should be inspected and certified by the Quality Inspector of Quality Assurance Establishment of Naval Base . Ext.P13 Temporary Duty Register would show that the appellants were entrusted with the work of inspecting the tarpaulin in the company of PW.1. In this context, the evidence of PW.3 who was the officer in charge of local purchase cell, Naval Store Depot is also to be considered. According to this witness, Ext.P6 series would show that

both the accused were entrusted with the work of checking the quality of tarpaulin supplied by PW.1 . It has come out from the evidence of PW.1 that it was the first accused who had demanded bribe and that the second accused had only nodded his head in agreement. When PW.1 was cross-examined on this aspect he stated that he did not know what the second accused meant when he nodded his head. Further, though it can be seen that on 8.9.1999 and 16.9.1999, both the accused had come together for inspection, neither PW.1 nor PW.8, the Manager of the company, had given any evidence to show that both the accused had conspired together to demand bribe from PW.1. The evidence of PWs.2, 6 and 10 would also show that at the time of recovery of MO.6 series, there was nothing to show the presence of the second accused or any kind of conspiracy between both the accused. The only circumstance to prove the alleged conspiracy was that both the accused had travelled together in the car. But PW.1 was also a passenger in the car and neither PW.1 nor the driver of the car who was examined as PW.5 had a case that there was any conversation between both the accused regarding the demand for bribe. The second accused had come to the company along with the first accused for discharging his official duty. In this regard, learned counsel appearing for the appellant in Crl. Appeal No.80 of 2002 invited the attention of this Court to the decisions of the Apex Court reported in **Bhagwan Swarup v.**

State of Maharashtra, A.I.R. 1965 S.C. 682 and **E.K.Chandrasenan v. State of Kerala, A.I.R. 1965 S.C.** 1066. In the former decision, the Apex Court held that unless and until all the ingredients of Section 10 of the Indian Evidence Act, 1872 is proved, an offence under Section 120B I.P.C. cannot be proved against any accused. The Apex Court further held in paragraph 8 of the judgment as follows:

> "**(1)**There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy; **(2)** if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other; **(3)** anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them; (4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour."

In the latter decision, the Apex Court considered the ingredients of conspiracy as contemplated under Section 120B I.P.C. and held that to find an accused guilty under Section 120B I.P.C., the prosecution should prove that there was direct meeting of the minds of two or more accused. In the light of the above principles enunciated by the Apex Court and the

finding entered by this Court, this Court is of the view that the prosecution had not adduced any evidence, direct or indirect, to show that both the accused had conspired together to demand bribe from PW.1 and hence the finding of the trial court that the appellants committed offence punishable under Section 120B I.P.C. is not sustainable. That being so, the conviction entered against the first accused - appellant in Crl. Appeal No.77 of 2002 under Section 120B I.P.C. is liable to be set aside.

11. The next question to be considered is regarding the contentions raised by the learned counsel appearing for the appellant in Crl. Appeal No.80 of 2002. This Court has already discussed the entire evidence adduced by the prosecution regarding conspiracy and found that the prosecution did not succeed in proving the offence under Section 120B I.P.C. In the light of the finding entered by this Court, the conviction entered and the sentence ordered against the appellant in Crl. Appeal No.80 of 2002 is liable to be set aside.

12. Learned counsel appearing for the appellant in Crl. Appeal No.77 of 2002 submits that the appellant has already retired from service and he is an aged person and hence a lenient view may be taken with regard to the sentences ordered against him. Considering the entire facts

and circumstances of the case, the conviction entered by the trial court against the first accused - appellant in Crl. Appeal No.77 of 2002 under Sections 7 and 13(1)(d) read with Section 13(2) is confirmed and the substantive sentences of three years of rigorous imprisonment under each count ordered by the trial court is reduced to two years of rigorous imprisonment under each count. The substantive sentences shall run concurrently. The appellant is also entitled to the benefit under Section 428 Cr.P.C. He is acquitted of the charge under Section 120B I.P.C. The conviction entered and the sentence ordered against the second accused - appellant in Crl. Appeal No.80 of 2002 are set aside and the appellant - second accused is acquitted of the charge levelled against him. The bail bonds executed by the appellants shall stand cancelled.

Accordingly, Crl. Appeal No.77 of 2002 is dismissed with the above modification in the conviction and sentences and Crl. Appeal No.80 of 2002 is allowed.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NOS.77 & 80/2002

JUDGMENT

26TH SEPTEMBER, 2007